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IN THE

Supreme Court of the United States

No. 74—1649

MARTIN SOSTRE,

Petitioner,

against

FRANK M. FESTA,

Respondent.

BRIEF IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-7657

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

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Opinions Below

The opinion of the District Court is not yet reported. It appears at petitioner's Appendix 1A. The opinion of the District Court is reported at 373 F. Supp. 133 and appears at petitioner's Appendix 18A.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

Question Presented

Does a recantation by a witness for the prosecution automatically entitle a convicted State court defendant to a new trial on a federal application for a writ of habeas corpus where a federal District Court Judge, after a full and fair hearing, finds the recantation unbelievable?

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History of the Case

On March 18, 1968 a judgment of conviction was entered in the Erie County Court (MARSHALL, J.) convicting petitioner, Martin Sostre, of the crimes of illegal sale of a dangerous drug, illegal possession of a dangerous drug, and assault in the second degree. He was sentenced to an indeterminate term of imprisonment for a minimum of not less than twenty-five (25) years and a maximum of not more than thirty (30) years for the illegal sale of a dangerous drug, not less than five (5) years and not more than ten (10) years for the crime of assault in the second degree, and a definite term of imprisonment of one year in the Erie County Penitentiary for the illegal possession of a dangerous drug. Sostre was also sentenced to thirty (30) days in the Erie County Jail for contempt of Court committed on the 15th day of March, 1968. All sentences were ordered to run consecutively.

By petitioner dated March 30, 1972, Sostre sought a writ of habeas corpus alleging that the principal witness for the prosecution, Arto Williams, had recanted his testimony that appellant had sold him drugs.

On May 14, 1973, the District Court issued writs of habeas corpus ad testificandum for the production of petitioner and Arto Williams so that a hearing could be held on the petition. The hearing commenced on May 29, 1973 and concluded on May 30, 1973.

The Trial

On the 4th day of March, 1968, trial commenced in County Court, County of Erie (MARSHALL, J.) under Indictment No. 33,508-3 charging appellant with a violation of Section 1751, Subd. 2 (sale of heroin), Section 1751-a (possession of heroin), and Section 242, Subd. 5 (assault

in the second degree) of the Penal Law of the State of New York.

Petitioner was not represented by counsel at the trial because of his rejection of the offer of various assigned counsel by the Court. (30, 116-117) However, several attorneys were available to Sostre during the course of the trial.

The first witness for the People was Arto Williams. Williams testified that he had known Sostre for about a year or two (32) and identified him as being present in the courtroom.

Williams testified that on July 14, 1967, he was acting as an informant for the Buffalo Police Department, that on that day he met with Detective Gristmacher and a State Trooper at Buffalo Police Headquarters. (33-34) He testified that he was searched by Detective Gristmacher in the presence of the State Trooper whereupon he was driven to Woodlawn and Dupont by Detective Gristmacher in the presence of State Trooper Steverson. (34-35) Williams said that he had been given $15.00 after he was searched by Detective Gristmacher. (35-36)

After arriving at Woodlawn and Dupont, Williams and Steverson entered a bookstore at 1412 Jefferson Avenue operated by Martin Sostre. (36) Also present in the bookstore at the time of their entry was a woman identified by Williams as Sostre's girl-friend. (36)

Williams testified that he asked Sostre whether he was "doing any business" and Sostre responded that he "did not want to do any business with any strangers in the store". (37) At that point he and Trooper Steverson went out of the store. He returned to the store, leaving Trooper Steverson in front of the store. Williams testified that from where he was standing, he was able to see Steverson after he went back into the store. (37) He asked Sostre whether he could "cop a bag" and Sostre responded "yes."

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(38) Williams gave Sostre the money he had previously been given by Gristmacher, Sostre took it and passed it to the female standing in the bookstore. She counted it and told Sostre that it was alright. Sostre then proceeded to the back of the store, remained a few minutes, came back out and handed Williams a bag. Williams left the store.

Upon leaving the store, Williams met State Trooper Steverson who was still standing in front of the open door and the two of them proceeded to Detective Gristmacher's vehicle. (30) He gave the bag to Detective Gristmacher. (38a)

Williams identified People's Exhibit #1 for Identification, a glassine bag, as the same glassine bag that had been given him by Sostre at Sostre's bookstore. (30) Sostre refused to cross-examine Williams. (40)

The next witness called was Louis T. Steverson, a Trooper with the New York State Police. Steverson confirmed the meeting between himself, Gristmacher and Williams (44) and that Williams was searched in his presence at 10:30 P.M. (45) Steverson further testified that he and Williams entered the Afro-Asian Bookstore at 1412 Jefferson Avenue and identified the defendant Sostre and a woman (Miss Robinson) as having been present on that evening. (46) At the time of their entry into the store, Williams asked Sostre if he, Williams, could "cop a bag." (46) Sostre turned towards Steverson, looked at him, and stated that he did not know Steverson and that he would not do any business in front of a stranger. (47) Steverson left the store in the presence of Williams and positioned himself in the doorway of the store with the door open. (47) He saw Williams give the woman identified as Miss Robinson some money, that she counted it, said something to Sostre, whereupon Sostre turned, walked to the rear of the store, came back up front, and handed Williams a white glassine envelope. (47-48)

Thereafter, Steverson and Williams returned to Detective Gristmacher's parked vehicle. Williams handed the glassine envelope to Gristmacher. (48)

Steverson identified People's Exhibit #1 as the same glassine envelope which Sostre had given to Williams and which Williams delivered to Detective Gristmacher. (48) Steverson testified that the glassine envelope contained a white powder. (50)

Sostre refused to cross-examine Steverson. (50)

The next witness for the People, was John Steinmetz, an Investigator for the New York State Police, Bureau of Criminal Investigation. (51) Steinmetz testified that he was in a surveillance spot on the opposite side of the street from 1412 Jefferson Avenue on the 14th day of July, 1967, taking photographs and observing the operations at 1412 Jefferson Avenue. He was accompanied to that position by State Trooper John Wilcox. (51-52) He observed State Trooper Steverson and Williams enter the bookstore at 1412 Jefferson Avenue at about ten minutes to twelve on July 14, 1967. He observed Williams and Steverson turn back out of the store. Steverson remained in the doorway, looking back into the store, and Williams re-entered the bookstore. Several minutes thereafter Arto Williams come out of the bookstore and Williams and Steverson walked back to Woodlawn Avenue and across Jefferson.

Sostre refused to cross-examine Investigator Steinmetz. (53)

The next witness for the People, was Investigator John P. Wilcox, a member of the New York State Police. (54) Wilcox testified that he had been taking movies of people entering and leaving 1412 Jefferson Avenue during a period of three days preceding July 14, 1967. (55)

Wilcox testified that on July 14, 1967, he and Steinmetz were together in a building across the street from 1412

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Jefferson Avenue, on the second floor. At approximately 11:50 P.M., he observed Williams and Steverson cross the street at Woodlawn and Jefferson and enter 1412 Jefferson Avenue. Wilcox observed Trooper Steverson come outside the building and further observed Williams handing money to Sostre's female companion inside the bookstore. Sostre went to the back of the bookstore, returned to the front of the bookstore and handed Arto Williams "something." Thereafter, Williams left the bookstore. (56)

Steinmetz testified that he made those observations aided by a telephoto lens on his camera. (57)

Sostre waived cross-examination. (57)

The next witness called for the People, was Alvin R. Gristmacher, a Detective Sergeant in the Narcotics Squad of the Buffalo Police Department. (57) Gristmacher testified that he met with Williams on July 14, 1967 at approximately 9:30 P.M. at Buffalo Police Headquarters. He introduced Williams to Trooper Steverson. (58) Thereafter Gristmacher searched Williams and gave him $15 in marked money.

Gristmacher drove Steverson and Williams to the corner of Dupont and Woodlawn whereupon Williams and Steverson left Gristmacher's automobile and walked west on Woodlawn Avenue out of Gristmacher's line of vision. Ten minutes later Steverson and Williams handed Gristmacher a glassine envelope containing a white powder. (59) Gristmacher placed his initials and the date on the glassine envelope and kept it in his possession until July 17, 1967 at which time he turned it over to the Buffalo Police chemist. (60)

Gristmacher identified People's Exhibit #1 as the glassine envelope which Williams gave him on July 15, 1967. (60) Sgt. Gristmacher described a search of the bookstore based upon a search warrant and the taking into custody of the defendant, Sostre. (60-61)

Gristmacher found a marked $10 bill in Sostre's possession upon searching Sostre after he was placed under arrest. (62) Gristmacher testified that this $10 bill was the same $10 bill which he had given to Williams at approximately 9:30 that evening. (62)

Sostre refused to cross-examine Gristmacher. (67)

The next witness called on behalf of the People, was Thomas Constantine, an Investigator with the Bureau of Criminal Investigation of the New York State Police. (68)

Investigator Constantine testified to a search in which he participated of the premises at 1412 Jefferson Avenue on July 15, 1967. (69) Constantine testified that upon the execution of the search warrant he found Martin Sostre and a female companion inside the bookstore along with two young males. (69)

Constantine testified that he searched the back portion of the store and in a filing cabinet located against the wall in the top drawer, he found a small pocket of glassine envelopes with a rubber band around them. (71) The ten glassine envelopes contained a white powder. (71) The glassine envelopes were marked for identification (72) and were identified by Constantine as the same envelopes which he found in Sostre's bookstore. (72)

The next witness called was Ronald T. Smith, a Detective Sergeant on the Narcotics Squad of the Buffalo Police Department. (73) Smith detailed the attack upon himself during the search of the store by Sostre while armed with a razor blade knife. (73-79)

Sostre refused to cross-examine Smith. (79)

Smith was recalled to the stand (88) and testified that Investigator Constantine turned over ten glassine envelopes containing a white powder to Smith on the evening of the raid at 1412 Jefferson Avenue. (88-89) He subsequently turned over the evidence to a police chemist. (89)

Sostre again refused to cross-examine the witness. (91)

Alvin R. Gristmacher was recalled to the stand. (92) He testified that on the night of the raid he was in the possession of a search warrant which had been signed by Judge Joseph A. Sedita, Associate Justice of the City Court of Buffalo. The search warrant was introduced into evidence. (93)

The next witness for the People was Alexander Rock, a member of the New York State Police. (94) Investigator Rock testified that he participated in the arrest at 1412 Jefferson Avenue on July 15, 1967. (94) Investigator Rock confirmed the earlier testimony of Detective Sergeant Gristmacher, State Police Investigator Thomas Constantine and Police Officer Ronald T. Smith. (94-97)

Bruce Jenson of the Federal Bureau of Narcotics was the next witness called by the People. (98) Agent Jenson testified that on July 15, 1967 he was present at 1412 Jefferson Avenue at approximately 12:05 A.M. (99) Jenson testified that he placed Geraldine Robinson, the female companion of Martin Sostre, under arrest and conducted a search of her purse. He discovered five one dollar federal reserve notes which he testified had been marked in his presence. (100-103)

Sostre again waived his right to cross-examine. (103)

Next testifying for the State was Joseph Vaughan (104), the chemist employed by the Buffalo Police Department. Vaughan was qualified as an expert in chemistry and testified that the exhibits seized from Sostre during the search of his store and the glassine envelope which Williams had purchased from Sostre all contained heroin. (104-111)

Sostre again waived his right to cross-examine the witness. (111)

The prosecution rested. (111)

The Hearing

Williams' version of the events that transpired on the evening of July 14, 1967 was simply incredible as he strained to tell a story that would fit in with the testimony of the different police officers who had accompanied him to petitioner's store.

Williams testified that he was released from jail on July 14, 1957 and met with Detective Sergeant Alvin Gristmacher of the Buffalo Police Department, Narcotics Division. (31) After receiving some money from Gristmacher, Williams stated that he took a bus to the east side of Buffalo where he purchased a bag of heroin. (90) This occurred sometime between 2:00 and 4:00 P.M. (90)

After purchasing the bag of heroin, he used half of it and saved the other half. (92) At some later time that day, he shot up some more drugs. (93) He met with Sergeant Gristmacher at 9:00 in the evening (32), at which time he was *very* high. (33) Yet, notwithstanding this condition and the fact that he was unaware of the exact plans for that evening, he concocted a scheme for hiding the drugs he had purchased earlier in the day under the front seat of Gristmacher's car, anticipating retrieving them later in the evening.

After meeting with Detective Sergeant Gristmacher, he and Gristmacher entered Gristmacher's private car and drove to the Buffalo Police Department Headquarters, where he waited in the car. (33)

When Sgt. Gristmacher returned, some 15 minutes later, in the company of another police officer, he got out of the car and was searched. By that time, Williams testified that he had already placed the remaining drugs under the front seat of the car. (33)

Subsequent to the search of his person and pockets, he entered the *back* of the car while Detective Sgt. Grist-

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macher and the other police officer got into the front of the car. (100)

During the intervening period between the drive from Buffalo Police Headquarters to a Judge's home and thereafter, to 1412 Jefferson Avenue, he bent down from the rear seat of the vehicle, reached under the bottom of the front seat and located the tiny envelope, 7/8" x 1 7/8", which he had earlier secreted, without drawing any suspicion from either of the two police officers sitting in the front seat of the car. (107, 148)

After arriving at the store, he went into the bookstore with Officer Steverson, saw petitioner, and ask him "What's happening". While he was talking to him, he indicated that he wanted to see him personally; yet, he couldn't recall the motion he made. (34) He gave petitioner the $15.00, and after petitioner took it, he brought his hand back across the counter and went to his shirt pocket. He had never asked petitioner to keep money for him before but he once asked him to hold a suit. (35) After he gave petitioner the money, petitioner went to the back of the store and he heard him talking to Geraldine Robinson. (36) Although Williams' transaction was completed, he remained at the front of the store. Petitioner eventually returned to the front of the store, they talked for a while and he left. (36) He then gave the drugs he had in his pocket to Gristmacher. (36)

On cross-examination, Williams testified that after testifying at petitioner's trial, he was placed on probation on a pending Erie County charge and, thereafter, in July, 1969 went to California without the permission of the Probation authorities. (78) He testified that he was not threatened after his trial testimony nor did he ever hear from anybody that they were going to get him. Yet he finally conceded that he feared for his life after his testimony and that his parents were worried. (78-80)

While in California in 1970, he joined an organization called Tuumest. In this organization he learned to be honest with himself and others and how to live within the eyes of the law and it was this influence which prompted him to change his testimony. (81-82) In April, 1971 he wrote an affidavit recapping his testimony. (83) He denied that subsequent to this affidavit that he was arrested on felony charges in California. (86) (Documents subsequently submitted to the District Court revealed two arrests on felony drug charges in California).

Sostre testified that he had not sold drugs to Arto Williams at any time, including the night in question, July 14, 1967.

Peter Notaro, an Assistant District Attorney with the Erie County District Attorney's Office, testified for the respondents. Notaro was the Assistant District Attorney who prosecuted Sostre in March, 1968. Notaro testified that after the trial of Sostre, Williams stated to Notaro that he was in fear of being injured by friends of Sostre because of his testimony against Sostre. (150)

John D. Steinmetz, an Investigator in the Bureau of Criminal Investigation of the Division of New York State Police, testified that he was on an assignment of surveillance of the Sostre bookstore at 1412 Jefferson Avenue on July 14, 1967, the evening of the sale. (165) He was accompanied at that location by John Wilcox, a member of the New York State Police. (165) He was able to observe Williams and a New York State Police Officer enter the bookstore at 1412 Jefferson Avenue and was further able to observe the individuals while inside. (168-167) Steinmetz testified that Investigator Wilcox was also observing the transactions at the bookstore, aided by a telephoto lens attached to a still camera. (174)

Lt. Thomas Constantine of the Division of New York State Police, testified that on July 15, 1967, he in the

company of other police officers of State, Federal and local government agencies executed a search warrant at 1412 Jefferson Avenue. He discovered a package of glassine envelopes containing a white powder in a filing cabinet in the back room of the Sostre bookstore. (185)

New York State Trooper Louis Steverson, testified that on July 14, 1967, he accompanied Arto Williams to the bookstore located at 1412 Jefferson Avenue. Officer Steverson testified that after Williams was searched, he returned to the front seat of the car, not the rear. He was able to observe Williams' head and a portion of Williams' shoulders at all times during their presence in Gristmacher's car and at no time did Williams bend over or reach under the front seat of the car. (200-201) He was able to observe, from a vantage point directly outside an open door, Williams hand a sum of money to a girl in the store. Sostre then went to the back of the bookstore, came forward, and handed Williams a white glassine envelope. (203-204)

The Opinions

After extensively analyzing the evidence at both the trial and the hearing, the District Court held that petitioner had failed to establish that Arto Williams' testimony at trial was false. The District Court observed that the record was clear that Williams feared injury in Buffalo after he testified at the 1968 Sostre trial. Yet, notwithstanding his fear of injury, he testified it was not until 1970 when he joined an organization called Tuumest, which he explained as devoted to influencing its members to be honest with themselves and to live within the eyes of the law, that he decided to execute the April, 1971 affidavit, recanting his trial testimony.

The Court questioned the sincerity of his motives since after the affidavit, he was arrested in September, 1972 and

December, 1972 in California on heroin felony charges. In early 1973, he pled to a misdemeanor drug count. The District Court observed that Williams' attitude was less than candid at the hearing since when cross-examined about these events, he stated that he had not been arrested for a felony charge and tried to explain away the arrest by insisting it was for the sale of baby aspirin.

The District Court additionally found Williams' story of the events of the evening of Sostre's arrest on its face open to serious question. By his own account he was "high" from drugs and had no idea of what he was expected to do. Yet he claimed that he secreted a tiny envelope under the front seat of the car and retrieved it while sitting in the back in the presence of two police officers without them being aware of it. Moreover, one of the officers, Steverson, testified that Williams was not even in the rear seat, but remained in the front seat at all times.

The District Court further observed that each time Williams testified about his transaction with Sostre, he gave a different account. At trial, he said he gave the $15 to Geraldine Robinson who was in the front of the store and that Sostre went to the rear of the store, returned, and handed him an envelope. At the hearing, he testified he gave the $15 to Sostre, Sostre went to the rear of the store where he spoke with Geraldine Robinson, returned and conversed briefly with him.

The Court went on to note that Williams' *trial* testimony was confirmed by Trooper Steverson at both the trial and hearing and by other witnesses.

Finally, Williams' testimony on direct and cross-examination at the hearing was conflicting. On direct, he testified that after he gave the money to Sostre, he brought his hand back across the counter to his shirt pocket. Upon cross-examination, he said he waited until Sostre returned from the rear of the store before putting his hand to his pocket.

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The District Court noted that although there was reason to question Williams' testimony there was no reason not to believe the police officer's testimony which supported Williams' original trial testimony. The District Court denied petitioner's application.

After reviewing the evidence adduced before the District Court, the Circuit Court held that the findings of Judge Curtin could not be characterized as clearly erroneous and affirmed the order of the District Court.

Petitioner's Application for A Writ of Certiorari Raises No Substantial Federal Question

Bared to its essentials, petitioner's sole claim at bar is that he is automatically entitled to a new trial on an application for a writ of habeas corpus because a prosecution witness, 3 years after petitioner's conviction, alleged that he had testified falsely at petitioner's trial notwithstanding that a District Court Judge, after a hearing, found the recantation unworthy of belief.

Petitioner has cited no authority for such holding and has failed to articulate any reason for such a conclusion. Recantations frequently occur years after trials and convictions, when witnesses and other evidence have disappeared, and to require that a prosecutor automatically retry a defendant on the basis of an unbelieved and clearly unbelievable recantation would wreak havoc on the criminal justice system.

The current rule which permits a federal judge on an application for a federal writ of habeas corpus by a state prisoner to determine if there is any substance to the recantation before ordering a new trial is the most liberal standard since it goes far to respect the rights of the individual defendant while accommodating the public interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, August 5, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel